



ABAC Adjudication Panel Final Determination No. 82/18

Product: Orange C NEIPA
Company: Rocky Ridge Brewery
Media: Packaging
Date of decision: 26 September 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns packaging for Orange C NEIPA by Rocky Ridge Brewery (“the Company”) and arises from a complaint received 16 August 2018.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;

(b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 16 August 2018.
8. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint has been determined within this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this marketing communication.

The Marketing Communication

10. The complaint refers to the packaging of Orange C NEIPA pictured here.

The Complaint

11. The complainant is concerned that the packaging looks like a can of orange juice and a child seeing it in the fridge would assume it is orange juice and would drink it.



The ABAC Code

12. Part 2(a) of the ABAC Code provides that The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:

....

- (d) product names and packaging

....

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (b)(i) have Strong or Evident Appeal to Minors;

14. Definition in Part 5 of the ABAC provide:

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A 'Minor' means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia

The Company's Response

15. The Company did not initially respond to the complaint but it did provide the following comments in response to the Panel's provisional determination:

a) We acknowledge the findings of the panel and wish to clarify some detail:

- It was never our intention to market a product that could be misleading to minors, we were simply trying to have some fun with the can design.
- The beer in question was launched specifically for an 18+ festival, where there was very limited opportunity for a minor to be able to come in contact with the can. We do acknowledge that there was a family session at this festival, however do not believe that the beer in question would easily be available to minors at this festival (as it would need to be purchased from a bar with standard RSA checks in place).
- While the beer has subsequently been made available outside of this original festival, there is no plan to re-release the product as it was specifically designed as a one-off release for this festival.
- The product has now sold out at most locations and is not readily available.
- The style of beer is very clearly labelled on the front of the can NEIPA (New England IPA)
- The alcohol percentage is very clearly labelled on the front of the can. While I acknowledge that perhaps the word 'Beer' may need to be present, I would also point out that it is rare to see a bottle or Piccolo of wine that has 'Wine' on the front of it

b) We will naturally in future take greater care not to have misleading graphics.

c) We do not advertise our products through print media or TV (where it may come into contact with minors) We only advertise through Social Media (where we choose our target audience of 21-45 year old Male and Females). We do not believe that this would have been easily accessible by minors under the age of 18.

d) We will naturally ensure we take into account this decision in the future design of packaging, as it is not our intention to mislead our market.

e) I understand that the panel is simply adjudicating within the scope of the current advertising framework, however would like to make it clear that

our product is not one that is advertised through 'traditional' means, our website requires that you are 18+ to access it, we specifically block minors from our social media pages and only use targeted advertising to an audience well above the legal drinking age in Australia. While we understand why the framework is in place, we would also respectfully note that in Australia you must be 18 years or older to buy an alcoholic beverage, that specifically here in Western Australia you cannot buy alcohol 'off-the-shelf', minimising the chance of a minor coming into contact with the can and would also question how much liability we can be expected to take for actions behind closed doors- we would (again respectfully) suggest that some form of responsibility should be on parents and guardians to ensure that alcoholic beverages are not accessible to minors.

- f) Again, we reiterate that we hear and accept the Panel's decision and will take care with designs in the future.

The Panel's View

16. The Rocky Ridge Brewing Company is a producer of craft beers located in Western Australia's Margaret River region. It would seem that the Company's products became available in or about March 2017 and as a new alcohol producer the Company is introducing to the market new products. This determination deals with the packaging for a newly released product branded as Orange C.
17. The Company is not a signatory to the ABAC Scheme and is not contractually bound to comply with Panel decisions. While the Company did not initially respond to the complaint it did provide comments to a provisional determination by the Panel which found that the packaging was in breach of the Code. In these comments the Company stated its intention to market and package its products consistently with ABAC standards and accordingly the Panel has been able to make a final determination on the complaint.
18. The complainant is concerned that the Orange C packaging makes the beer look like orange juice and this may lead to a child consuming the product. The relevant Code standard provides that alcohol product packaging must not have strong or evident appeal to under 18 year olds. One way this standard could be breached is if imagery, designs or motifs are used that create confusion with confectionary or soft drinks.
19. It is reasonably common for alcohol marketing codes internationally to contain a provision prohibiting packaging which may cause confusion with a soft drink. Equally the liquor licensing regimes in each of the Australian States and Territories also contain similar restrictions. For instance in Western Australia, The Liquor Control Act enables the making of regulations to ban any alcoholic product that appeals to children in the way they are marketed and packaged including where the product is likely to be confused with soft drink.
20. While each case needs to be assessed on its own circumstances, an alcohol product package might be considered confusing with a soft drink if one, or more likely several, of the following occur:

- the product has visual design features that resemble a soft drink or fruit juice such as the display of fruit images, bright colours and use of a font style found typically on soft drinks or fruit juices;
 - there is a lack of a clear indication that the product is alcoholic beverage eg prominent use of term such as 'beer' or 'ale' or a type of alcohol eg vodka, wine etc;
 - terms or names are used which could reasonably and commonly be associated with soft drink or fruit juice eg orange, lemon, blueberry, pop, smash etc;
 - the type of the physical package is similar to that used by soft drinks or fruit juices eg Prima style juice box.
21. On 4 September 2018 the Panel made a provisional determination that the packaging of the product breached Part 3(b)(i) of the Code. The rules applying to the adjudication process provide an entitlement for a marketer to seek a rehearing of an adverse finding in relation to product packaging. The Panel took the Company's response to the provisional determination as seeking a fresh determination of the complaint. In finalising this decision the Panel has looked at the matter afresh and taken into consideration the comments received from the Company.
22. The Company has argued that it did not intend to market a product that would be appealing to minors or be confused with a soft drink. It pointed out that:
- the intention was to have a fun can design;
 - the product would have very limited exposure to minors and was not marketed via broadcast media such as print or television;
 - the Company applies age gating to its use of social media to endeavor to block minors from accessing its marketing; and
 - the general law prohibits under 18 year olds from purchasing alcohol and parents should have some responsibility to ensure that alcohol is not available to children.
23. The Panel acknowledges the arguments made by the Company. Responsible alcohol use is a shared responsibility between individuals, the alcohol industry and Government. Within this framework parents do have a core responsibility to adopt and model responsible practices in relation to their children and the use of alcohol.
24. The ABAC represents one element of part of the social compact for responsible alcohol use that needs to be fulfilled by the alcohol industry. The standards contained within the ABAC are essentially common sense and should be

satisfied irrespective of the requirements of the general law or the expected guidance of adults and parents toward children.

25. While the Company may not have had an intention to market a product with strong appeal to minors the test is not the Company's intention but how a reasonable person would understand the packaging. The fact that the Company endeavours to use marketing mediums such as social media which can be directed more effectively towards adult audiences does not relieve the Company from its obligation to meet the ABAC standards.
26. The Panel believes that the packaging for the Orange C product does breach Part 3(b) of the ABAC provisions. In reaching this view the Panel has noted that the packaging:
 - uses the name Orange C which could readily be expected to be used by a soft drink or fruit juice;
 - is similar in appearance to a can of orange flavoured soft drink;
 - uses colouring which is similar to that used on orange flavoured soft drinks;
 - uses a depiction of a stylised orange which could readily be found on orange flavoured soft drinks;
 - does not contain any easily recognised term that the product is a beer, for instance the term beer or ale is not used; and
 - the inclusion of NEIPA on the can would not clearly identify the product as a beer given the other features which closely resemble an orange soft drink.
27. Accordingly the complaint is upheld.